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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re DELILAH A. et al., Persons Coming  
Under the Juvenile Court Law.

B262920

(Los Angeles County  
Super. Ct. No. CK97614)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

BERNICE C.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Amy M. Pellman, Judge. Affirmed.

Andre F. F. Toscano for Defendant and Appellant.

Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Jessica Paulson-Duffy, Deputy County Counsel for Plaintiff and Respondent.

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## **INTRODUCTION**

Mother Bernice C. appeals the termination of her parental rights as to her daughter, Delilah, and her son, Liam, arguing that the juvenile court erred in finding that the relative-caregiver exception to the termination of parental rights, set forth in Welfare and Institutions Code section 366.26, subdivision (c)(1)(A), was inapplicable. This exception to termination applies only when the dependent minor is living with a relative who is not able or willing to adopt the child, but who is willing to become the minor's legal guardian. We affirm the judgment as substantial evidence that the relative caregiver was willing to adopt both children supports the court's determination. In addition, Liam never lived with the relative caregiver and thus this exception to termination was inapplicable to him on that basis as well.

## **FACTS AND PROCEDURAL BACKGROUND**

Early in 2013, DCFS removed one-year-old Delilah and three-month-old Liam from the parents' custody after medical personnel ascertained that Liam had suffered bilateral retinal hemorrhages, bilateral chronic and acute subdural hematomas, and a healing rib fracture. Mother provided no explanation for Liam's injuries and Father's explanation conflicted with Liam's injuries, which were consistent with non-accidental trauma, specifically Shaken Baby Syndrome. In June 2013, the juvenile court found jurisdiction over the children pursuant to section 300, subdivisions (a), (b), (e), and (j). The court sustained allegations that Liam's injuries were the "result of deliberate, unreasonable, and neglectful acts by" Father and the "neglectful acts" of Mother.

Liam never regained consciousness, has minimal brain activity, and remains hospitalized, on life support. Delilah was placed in the paternal grandmother's care and developed a close relationship with the paternal grandmother and paternal aunt. After DCFS provided 17 months of reunification services to Mother, the court terminated family reunification services because Mother failed to make substantial progress with her reunification case plan. The court never provided Father with reunification services due to the severity of Liam's physical abuse and injuries.

In December 2014 and January 2015, the court held contested section 366.26 hearings. Mother, the paternal grandmother, and the paternal aunt testified at the hearings. Mother testified regarding recent improvements in her visitation and relationship with the children. The paternal grandmother also described Mother's relationship with the children. The grandmother first indicated that she wanted to adopt the children. She then stated that she preferred "to do legal guardianship" because she believed Mother would reunify with Delilah if allowed additional time. The paternal aunt testified that she wanted to adopt both children and that she intended to allow Mother to continue to visit the children.

DCFS requested the juvenile court terminate parental rights because both children were adoptable, the children had relatives willing to adopt, and Mother failed to demonstrate that an exception to adoption applied. Counsel for the children requested the juvenile court to find Liam was specifically adoptable by the paternal grandmother and the paternal aunt, and terminate parental rights as to Liam. Counsel for the children asked the court to order legal guardianship and not to terminate parental rights as to Delilah based on Delilah's wishes. Mother's counsel requested the court to order legal guardianship for both children, asserting that Liam was not adoptable due to his medical condition and that the paternal grandmother preferred legal guardianship.

In January 2015, the court terminated the parents' parental rights pursuant to section 366.26, finding that Liam was specifically adoptable and that Delilah was generally adoptable. The court summarized the evidence, stating that although it is clear that Mother loves Delilah, "[t]he evidence shows that Mother shows up for visits when it is convenient when she gets a ride. [Mother] doesn't live far from the paternal grandmother. [Mother] doesn't live far from the paternal aunt's home. And they, in fact, have an open-door policy. The paternal aunt testified that Mother could come visit to the home any time, but Mother doesn't. . . . Mother comes for visits when somebody will go pick her up and somebody will drop her off. If somebody does not pick her up and drop her off, she doesn't go to visit. In fact, the paternal grandmother testified that there have been times when paternal grandmother has herself tried to encourage Mother to visit

more often, and sometimes Mother didn't always return those calls." The court opined that Mother had not even asked about Delilah's medical appointments or schooling. The court explained that as to Liam, Mother made no efforts to continue visiting him at the hospital after hospital staff told her the paternal grandmother could no longer monitor visitation.

The court noted that "the paternal grandmother testified that she would prefer legal guardianship over adoption whereas the paternal aunt said that she would prefer adoption over legal guardianship." The court further stated that "[i]t appeared to the court that the paternal grandmother, out of the goodness of her heart, saw that this mother was finally trying to have . . . a relationship with Delilah and wanted to give her more time." In concluding that "the law does not provide for more time," the court explained that "Mother has had almost two years, almost two years of time to do what the court asked her to do. To make proactive efforts to see her children, and she has not done that. And so the court will indicate that a mere preference for guardianship by a relative [is] not enough to . . . stop termination of parental rights." The court found that Mother failed to meet the exceptions to adoption set forth in section 366.26, subdivision (c)(1), including the relative caregiver exception.

## **DISCUSSION**

Mother appeals the court's termination of her parental rights and findings that Liam was specifically adoptable and that Delilah was generally adoptable. Mother argues that the court erred at the section 366.26 selection and implementation hearing by not applying the relative caregiver exception to the termination of her parental rights. "On appeal, we review the factual basis for the trial court's finding of adoptability and termination of parental rights for substantial evidence." (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732 (*Josue G.*)). We "presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those

findings. The parent has the burden of showing that there is no evidence of a sufficiently substantial nature to support the finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947 (*L.Y.L.*.)

“The selection and implementation hearing under section 366.26 takes place after the juvenile court finds that the parents are unfit and the child cannot be returned to them.” (*Josue G., supra*, 106 Cal.App.4th at p. 732.) At this stage, “the juvenile court [is] left with three alternatives: adoption, guardianship or long-term foster care.” (*In re Teneka W.* (1995) 37 Cal.App.4th 721, 728.) Adoption is the preferred permanent plan for the children. (*In re Marina S.* (2005) 132 Cal.App.4th 158, 164.) “If a child is likely to be adopted, parental rights must be terminated unless one of several enumerated exceptions applies.” (*Ibid.*)

Here, it is undisputed that Liam was specifically adoptable and Delilah was generally adoptable. At issue in this case is the applicability of the relative caregiver exception to adoption and termination of parental rights. That exception applies when the dependent minor is living with a relative who is not able or willing to adopt the child because of reasons not having to do with an unwillingness to accept the legal or financial responsibility that accompanies adoption, but who is willing to become the minor’s legal guardian. If such relative caretaker is able to provide the child with a stable and permanent environment through legal guardianship, and if removing the child from the caretaker’s home would be detrimental to the child’s emotional well-being, then the dependency court will choose legal guardianship instead of adoption. (§ 366.26, subd. (c)(1)(A).)

First, we conclude that the relative caregiver exception does not apply to Liam, as he has not lived with a relative, as required by the statute. Liam has been hospitalized and in a vegetative state from the inception of these dependency proceedings. Thus, the court properly found that the relative caregiver exception was inapplicable to his permanent placement plan.

As to Delilah, Mother asserts that the relative caregiver exception to adoption applies because the paternal grandmother, who had custody and was caring for Delilah at the time of the section 366.26 hearing, testified that she preferred legal guardianship over adoption. Mother relies on *In re K.H.* (2011) 201 Cal.App.4th 406 (*K.H.*), in support of her argument that the relative caregiver exception applies here. In *K.H.*, the Fifth District Court of Appeal upheld the juvenile court's order of long-term guardianship, which the social services department appealed. (*Id.* at p. 419.) *K.H.* court stated that "the Legislature intended that a relative caregiver's preference for legal guardianship over adoption be a sufficient circumstance for application of the relative caregiver exception as long as that preference is not due to an unwillingness to accept legal or financial responsibility for the child." (*Id.* at p. 418.) In that case, the juvenile court determined that the relative-caregiver exception applied where the grandparents affirmatively "testified they were unwilling to adopt the children because they wanted to remain the children's grandparents." (*Id.* at p. 419.)

We find *K.H.* distinguishable because the relative caregivers in that case consistently and firmly stated that they were unwilling to adopt the minors. (*K.H.*, *supra*, 201 Cal.App.4th at p. 419.) Here, on the other hand, the paternal grandmother never indicated that she was unwilling or unable to adopt Delilah. Just prior to the section 366.26 hearing, the paternal grandmother communicated to DCFS that she remained interested in adopting both children. At the beginning of the section 366.26 hearing on December 30, 2014, the paternal grandmother stated that she wanted to adopt both children. She subsequently indicated that she preferred legal guardianship so that Mother could have more time to reunify with the children.

The record indicates that in light of the paternal grandmother's consistent willingness to adopt the children, the court did not find the paternal grandmother's cursory, last-minute statement that she preferred guardianship to establish that the grandmother was affirmatively unwilling to adopt the children. As the court indicated, the preference for legal guardianship was only espoused by the paternal grandmother in order to provide Mother additional time to reunite with Delilah. The paternal

grandmother's statements at the hearing never expressed an unwillingness to adopt the children. We note that it is the juvenile court's role to assess the credibility of witnesses and resolve the conflicts in the evidence; we cannot reweigh the evidence, second-guess the juvenile court's credibility determinations, or substitute our judgment for that of the juvenile court. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) We thus do not second-guess the court's assessment of the paternal grandmother's testimony and credibility. Substantial evidence supports the court's determination that the paternal grandmother was willing to adopt.

We do not review the record to determine whether there is substantial evidence to support a contrary finding by the juvenile court (i.e., the section 366.26, subdivision (c)(1)(A) exception applies), but rather we review the entire record to determine whether there is substantial evidence to support the finding the court made (i.e., the section 366.26, subdivision (c)(1)(A) exception does not apply). (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 947; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) The burden on appeal is on Mother to show that the judgment was not supported by substantial evidence and thus demonstrate that the relative-caregiver exception does apply. We conclude Mother has failed to do so because there is no evidence of the paternal grandmother's affirmative *unwillingness or inability* to adopt Delilah.

We conclude that substantial evidence<sup>1</sup> supports the juvenile court's determination that the relative-caregiver exception to adoption did not apply, and we reject Mother's claim to the contrary.

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<sup>1</sup> Mother asserts that an abuse of discretion standard applies to the court's determination that the section 366.26, subdivision (c)(1)(A) exception did not apply. For support, Mother cites case law related to the juvenile court's decisions regarding whether or not to terminate jurisdiction. (See *In re Shannon M.* (2013) 221 Cal.App.4th 282, 289.) We disagree with Mother, concluding that the substantial evidence standard of review is most appropriate when reviewing the court's decision that the relative caregiver exception was inapplicable. In any event, the abuse of discretion standard is very similar to the substantial evidence standard when, as here, the reviewing court examines a factual determination based on the lower court's evaluation of evidence presented by opposing parties. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [applying an abuse of

## **DISPOSITION**

The juvenile court's judgment is affirmed.

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JONES, J. \*

We concur:

ALDRICH, Acting P. J.

LAVIN, J.

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discretion standard to the juvenile court's finding, pursuant to a since-amended version of section 366.26, subdivision (c)(1), that there was a compelling reason for determining that termination would be detrimental to the child; stating that the holding would be the same under the substantial evidence standard of review].) Our conclusion under the abuse of discretion standard of review would be the same.

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.